Western Plant Services, Inc., a wholly-owned subsidiary of Hall-Buck Marine, Inc. *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO. Case 19–CA–23967

September 6, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On May 10, 1996, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 5.

"5. By refusing to recognize and bargain with OCAW Local 1-591, as the representative of its employees in the above-described appropriate unit, and by unilaterally altering the unit employees' wages, hours of work, holidays, vacations, health and welfare coverage, and pensions, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Western Plant Services, Inc., a wholly-owned subsidiary of Hall-Buck Marine, Inc., Anacortes, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling applicants for employment at its Anacortes, Washington operation that it is a nonunion company and that it intends to remain nonunion.

(b) Refusing to employ or consider for employment those employees of its predecessor at its Anacortes, Washington operation in order to avoid successorship recognition and bargaining obligations toward Oil, Chemical and Atomic Workers International Union, Local 1-591, AFL–CIO (OCAW Local 1-591).

(c) Refusing to employ employees believed to be engaged in concerted activities protected under the National Labor Relations Act on behalf of OCAW Local 1-591.

(d) Refusing to recognize and bargain with OCAW Local 1-591 as the representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by Western Plant Services, Inc., at Texaco's Anacortes, Washington refinery, including working foremen, industrial maintenance workers, mechanics, operators, equipment operators, maintenance welders, maintenance mechanics, and laborers, but excluding office clerical employees, casual "load out" employees and guards and supervisors as defined in the Act.

(e) Unilaterally altering the unit employees' wage rates, hours of work, holidays, vacations, health and welfare coverage, and pensions from those which existed prior to June 1, 1995, at the Anacortes, Washington operation.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with OCAW Local 1-591 as the representative of the employees in the above unit.

(b) On request of OCAW Local 1-591, cancel any changes from the terms and conditions of employment of employees employed in the unit specified above that existed immediately before its taking over the Anacortes, Washington operation it now conducts and retroactively restore the preexisting terms and conditions of employment, including wage rates, hours of work, holidays, vacations, health and welfare coverage, and pensions.

(c) Make its Anacortes, Washington employees in the above unit whole by remitting all wages and benefits that would have been paid to them absent the unilateral changes which it made in the wage rates, hours of work, holidays, vacations, health and welfare coverage, and pensions effective June 1, 1995, from that time until it negotiates in good faith with OCAW Local 1-591 to agreement or impasse in the manner specified in the remedy section of the judge's decision in this case.

(d) Within 14 days from the date of this Order, offer full employment to Stan Bragg, Les Brown, Warren

[1] We find merit in the two exceptions filed by the General Counsel.

First, we shall correct the judge's Conclusions of Law, recommended Order, and notice to reflect the fact that the employees' collective-bargaining representative is the Local Union, not the International Union.

Second, because the Respondent engaged in egregious and widespread misconduct, we find it necessary to issue a broad cease-and-desist Order. Thus, the Respondent told applicants for employment that it intended to operate on a nonunion basis in violation of Sec. 8(a)(1), implemented the unlawful hiring plan by discriminating against 12 employees in violation of Sec. 8(a)(3), and refused to bargain with the Union in violation of Sec. 8(a)(5). Accordingly, we shall require the Respondent to cease and desist from infringing in any other manner with rights guaranteed employees by Sec. 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

In addition, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

Fry, William Gillette, Tom Handy, Larry Lantis, Ron Marlow, Ron Mayfield, Jeff Thurmond, and Larry White in the positions they formerly held at the Anacortes, Washington operation which it now conducts, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed, discharging, if necessary, employees hired from sources other than the predecessor employer at that location to make room for them.

(e) Within 14 days from the date of this Order, offer Robert Nickerson full employment to the position previously offered to him prior to its withdrawal of that offer on May 31, 1995, or to the position he formerly held with its predecessor at the Anacortes, Washington operation, if he so chooses.

(f) Make Stan Bragg, Les Brown, Warren Fry, William Gillette, Tom Handy, Larry Lantis, Ron Marlow, Ron Mayfield, Jeff Thurmond, Larry White, Robert Nickerson, and Larry Rhinas whole for any loss of earnings and other benefits suffered by reason of its failure to employ them on or about June 1, 1995, in the manner specified in the remedy section of the law judge's decision.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Anacortes, Washington facility, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 1995.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell applicants for employment at our Anacortes, Washington operation that we are a nonunion company and intend to remain nonunion.

WE WILL NOT refuse to employ or consider for employment those employees of our predecessor at our Anacortes, Washington operation in order to avoid successorship recognition and bargaining obligations toward Oil, Chemical and Atomic Workers International Union (OCAW), Local 1-591, AFL–CIO.

WE WILL NOT refuse to employ employees believed to be engaged in concerted activities protected under the National Labor Relations Act on behalf of OCAW Local 1-591.

WE WILL NOT refuse to recognize and bargain with OCAW Local 1-591 as the representative of our employees in the following appropriate unit:

> All production and maintenance employees employed by us at Texaco's Anacortes, Washington refinery, including working foremen, industrial maintenance workers, mechanics, operators, equipment operators, maintenance welders, maintenance mechanics, and laborers, but excluding office clerical employees, casual "load out" employees, and guards and supervisors as defined in the Act.

WE WILL NOT unilaterally alter the unit employees' wage rates, hours of work, holidays, vacations, health and welfare coverage, and pensions from those which existed prior to June 1, 1995, at the Anacortes, Washington operation which we assumed on that date.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer full employment to Stan Bragg, Les Brown, Warren Fry, William Gillette, Tom Handy, Larry Lantis, Ron Marlow, Ron Mayfield, Jeff Thurmond, and Larry White in the positions they formerly held at the Anacortes, Washington operation which we now conduct or, if such positions no longer exist, in substantially equivalent positions, without prejudice to seniority or other rights and privileges they previously enjoyed, discharging, if necessary, employees hired from sources other than the predecessor employer at that location to make room for them.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Nickerson full employment to the position previously offered to him on or about May 31, 1995, or to the position he formerly held with our predecessor at our Anacortes, Washington operation, if he so chooses.

WE WILL make Stan Bragg, Les Brown, Warren Fry, William Gillette, Tom Handy, Larry Lantis, Ron Marlow, Ron Mayfield, Robert Nickerson, Larry Rhinas, Jeff Thurmond, and Larry White whole for the losses they suffered by reason of our failure to employ them on or about June 1, 1995.

WE WILL, on request, recognize and bargain with OCAW Local 1-591 as the representative of our employees in the appropriate unit.

WE WILL, on request of OCAW Local 1-591, cancel any changes in the terms and conditions of employment of employees employed in the unit specified above that existed immediately before June 1, 1995, at our Anacortes, Washington operation, and retroactively restore the preexisting terms and conditions of employment, including wage rates, hours of work, holidays, vacations, health and welfare coverage, and pensions.

WE WILL make those employees actually employed in the above unit at our Anacortes, Washington operation whole by paying them the wages and benefits that would have been paid to them absent the unilateral changes which we made effective June 1, 1995, for the period from that time until we negotiate in good faith with OCAW Local 1-591 to an agreement or an impasse.

WESTERN PLANT SERVICES, INC., A WHOLLY-OWNED SUBSIDIARY OF HALL-BUCK MARINE, INC.

Daniel R. Sanders, Esq., for General Counsel.
Lester V. Smith Jr., Esq. (Bullard, Korshoj, Smith & Jernstedt), of Portland, Oregon, for the Respondent.
Elizabeth Ford, Esq. (Schwerin, Burns, Campbell & French), of Seattle, the Washington, for Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The principal issue presented by this case is whether the employer refused to hire a majority of its predecessor's represented employees in order to avoid an obligation to recognize and bargain with a labor organization under the *Burns* successorship doctrine.[1] Based on the findings below, I have concluded that the employer engaged in the unfair labor practices alleged.

The Oil, Chemical and Atomic Workers International Union, AFL–CIO (OCAW or Union) filed the charge and the amended charge on June 2 and August 23, 1995, respectively.[2] Based on the charge, the Regional Director for Region 19 of the National Labor Relations Board (NLRB or Board) issued the complaint on behalf of the General Counsel on August 24. The complaint alleges that Western Plant Services, Inc. (WPS or Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act). WPS filed a timely answer denying that it engaged in the unfair labor practices alleged.

I heard this case at Burlington, Washington, from October 31 through November 2. All parties participated fully at the hearing and filed timely posthearing briefs in lieu of oral argument. Based on the entire record of the case, as well as my observations of the witnesses, and my careful consideration of the posthearing briefs, I now make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Louisiana corporation, maintains an office and place of business at the refinery of Texaco, Inc., in Anacortes, Washington, where it removes and processes petroleum coke manufactured by Texaco. In the year preceding the issuance of this complaint, Respondent's combined direct and indirect outflow at this location exceeded the discretionary standard established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Respondent admits its status as an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union's status as a labor organization within the meaning of

[1] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). In that case, the Supreme Court held that a new employer succeeds to its predecessor's collective-bargaining obligation if it continues an existing enterprise essentially unchanged and hires a majority of its predecessor's represented employees.

[2] All dates are 1995 unless otherwise indicated.

Section 2(5) of the Act. Accordingly, I find that it would effectuate the policies of the Act for the Board to exercise its jurisdiction to resolve this labor dispute.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *An Overview*

Texaco maintains a processing operation at the Anacortes refinery which converts unrefined oil into petroleum coke, a coal-like industrial fuel. This process, performed the area of the refinery referred to as the delayed coking unit (DCU), begins with the injection of unrefined oil into a large drum, several stories in height, capable of yielding 900 tons of coke. Thereafter, Texaco employees cook the oil at 923 degrees Fahrenheit for a certain period, and then quench the drum's contents with water to cool and harden the product. The end result is a substance referred to as "sponge coke" in the industry. Since 1984, the removal of the coke from the drum and its subsequent processing has been performed by an outside contractor, currently WPS.

When cooled sufficiently, employees of the DCU contractor remove the top and bottom drum "heads" or sealed caps and cut the hardened coke from the drum with a giant hydraulic drill. The coke chunks fall into a pit beneath the drum. At intervals in the cutting process, the contractor's employees scoop the coke from the pit with a large crane and deposit it onto a conveyer belt running to a crusher. Following the crushing operation, the coke is belt-conveyed to nearby storage areas. Subsequently, the contractor's employees load the coke from storage on to trucks for transport to ships or barges at the Anacortes port, or on to rail cars for transport to Texaco's customers. The DCU has two drums which allow for a continuous operation; while one drum is being emptied, the other drum is cooking. Usually the contractor has a new drum for processing every 16 hours.

The previous DCU contractor, Alpha-Omega Constructors (AO) of nearby Burlington, Washington, entered into a 3-year contract with Texaco in 1990. In 1993 Texaco extended AO's agreement for a 2-year period.

When AO commenced its contract with Texaco, its employees were represented by Petroleum and Industrial Workers Union (PIWU). However, in March 1992, the AO employees selected OCAW as their representative and shortly thereafter AO entered into a collective-bargaining agreement with Local 1-591, OCAW's local union in Anacortes.[3] Effective April 1, AO and Local 1-591 entered into a successor agreement that established the following classifications and hourly pay rates: Coke Cutter I (CCI)—$17; Coke Cutter II (CCII)—$14.40; Maintenance Mechanic (MM)—$17; Lima Crane Operator (LCO)—$17; Equipment Operator (EO)—$15.70; and Laborer—$10. The agreement further provided for hourly pay hikes of 25 cents every 6 months through October 1997.

AO employed 17 or 18 full-time individuals on the decoker operation at the time these events began, including supervisor Tim Erickson. AO's owner, Mary Swartz, explained that her company employed four 3-man crews. Each crew included a CCI (who served as the crew leader), a CCII, and an equipment operator. Each crew worked a 12-hour shift. In addition, AO employed two mechanics, possibly a laborer, a vacation relief employee, and a safety coordinator-trainer who served as a nonsupervisory night foreman.[4]

In March 1995, Texaco decided to solicit bids for its decoker operation in order to "test the market." Texaco asked interested contractors to submit bids for handling its bulk coke on a cost-per-ton basis. In effect, Texaco sought a "hard-dollar contract" which required the contractor to absorb cost overruns. Five companies, including AO and Hall-Buck Marine (Hall-Buck), submitted bids. Eventually, Texaco selected Hall-Buck as its new contractor.

Hall-Buck has 18 operations around the United States. At a majority of these sites, Hall-Buck operates rail or ship terminals. Nearly all of these terminal operations are organized. At a few sites, Hall-Buck is involved in the operation of coker units similar to the Texaco's Anacortes unit. None of its coker operations are organized. In the western United States, Hall-Buck established a subsidiary, WPS, to manage its operations. A Hall-Buck vice president, Kermit Petrie, oversees the west coast operations.

Don Duff, senior vice president of marketing and engineering, prepared Hall-Buck's bid. In consultation with Elon (Buster) Smelley, a Hall-Buck regional manager for coker operations, Duff calculated the labor costs for the bid by adjusting labor rates at its Exxon decoker operation in Baton Rouge, Louisiana, by the consumer price index and estimated the rates for Anacortes in a range from $9 to $11.50 per hour. Duff claims that he consulted an unnamed Texaco official who said the projected rates were "in the ballpark."

Hall-Buck submitted the lowest bid. Before it awarded the contract, however, Texaco officials requested that Hall-Buck representatives attend a preaward conference at the Anacortes refinery on May 9. Duff, Petrie, and Smelley represented Hall-Buck at this conference. It included a physical walk around of the areas related to the DCU unit, discussions about the contract language, and Hall-Buck's plans for handling certain responsibilities.

During the conference, Petrie mentioned that Hall-Buck generally operated in nonrepresented environment and asked how Texaco felt about a nonunion company. Leonard Reagin Jr., Texaco's human resources manager, told Petrie that Texaco would not address the labor relations of its independent contractors and suggested that Petrie consult his own legal counsel about such matters. However, Reagin explained to Petrie that for a number of years the PIWU represented the employees of the bulk coke contractors but midway into AO's Texaco contract OCAW became the certified representative of the decoking employees. After admitting that he did

[3] In 1992 the Board certified OCAW as the representative for the following unit:

> All production and maintenance employees employed by [Alpha Omega at Texaco's Anacortes, Washington refinery], including working foremen, industrial maintenance workers, mechanics, operators, equipment operators, maintenance welders, maintenance mechanics, and laborers, but excluding guards and supervisors as defined in the Act.

However, AO's latest collective-bargaining agreement modified the certified unit to explicitly exclude office clerical employees and casual "load out" employees. See C.P. Exh. 1, p. 1. The appropriate unit alleged in the complaint incorporates these exclusions.

[4] G.C. Exh. 3 lists Marty Cabello as a laborer. Although this exhibit was received without objection, his actual status as a unit employee is not without doubt.

not realize that the previous contractors had been unionized, Petrie again asked whether Texaco had a particular preference but Reagin again declined to state any position.

Following the May 9 conference, Texaco requested that Hall-Buck furnish a startup action plan for taking over the decoker operation by June 1. Hall-Buck furnished Texaco with a document entitled "Contract Implementation Action" which Buster Smelley prepared. The document, which flagged May 15 as the target date for mobilization, outlined Hall-Buck's anticipated hiring and safety training before taking over the operation. It also states that Hall-Buck intended to hire the majority of its employees from AO's current employee complement.[5]

Texaco officially notified Duff on May 16 that WPS had been awarded the Anacortes contract effective at midnight on June 1, leaving 15 days for Hall-Buck to hire a crew. To begin this task, Smelley, the Hall-Buck manager placed in charge of the transition, Gerald Smith, Hall-Buck's personnel director, and Richard Copeland, an assistant manager at Hall-Buck's Exxon coker operation, arrived in Anacortes near midnight on May 17 from Louisiana.

On Thursday, May 18, the three Hall-Buck officials visited the refinery to notify Texaco officials of their presence. Smith claims that he had planned to be at the site the entire day to meet AO's manager, Tim Erickson, and to interview AO employees. However, he claims he learned after arriving there that he could not enter the DCU site because his OSHA certification card had expired.[6] Smith purportedly returned to his motel and contacted the Washington Department of Employment Security (DES) office in nearby Mt. Vernon to set up introductory interviews for a backup employment pool.

Later that day, Smelley and Smith contacted Erickson by telephone and arranged interview him at their Anacortes motel after work on May 18. Following that interview, Smith hired Erickson and asked him to facilitate interviews with the AO employees. Smelley provided Erickson with Hall-Buck application forms for distribution to the AO crew. In addition, Smelley gave Erickson copies of a single-page description of Hall-Buck's fringe benefit package and verbally informed him of the wage rates. The benefit package and the wage rates differed from those in effect under the AO-OCAW collective bargaining agreement. Most noticeably, the wage rates were up to $6 per hour lower than the rates in the agreement. There is no dispute about the fact that Respondent did not notify or discuss its wage rates and benefit package with the Union at anytime.

Erickson promptly returned to the refinery where he set out the Hall-Buck applications for the crew together with a description of the Hall-Buck benefits. Although the Hall-Buck officials purportedly vested Erickson with authority to decide who would be hired from the existing AO crew, as a matter of fact absolutely no AO employee obtained a job without a prior interview by Smelley and Smelley appears to have been the individual who decided what job was offered to whom. According to Erickson, WPS sought a crew of 12 employees to work on the structure (the coke drums) and 4 mechanics.

Over the course of the next 14 days, WPS hired 4 of the 16 or 17 AO unit employees who filed applications with WPS and sought employment. They were: Jim Berlin, Dave Murdzia, Robert Nickerson, and Gerald Shelton. However, Erickson notified Nickerson that he should not come to work as originally scheduled on the night of May 31 and Nickerson has never actually worked as a WPS employee. WPS also hired AO employee Marty Cabello but the record is unclear as to whether he was an AO unit employee or an excluded casual load out employee. In its brief, WPS claims that it attempted unsuccessfully to employ four additional AO employees—Stan Bragg, Warren Fry, Jeff Thurmond, and Larry White—and that Erickson did not recommend or act on the applications of six other AO employees—Les Brown, William Gillette, Tom Handy, Larry Lantis, Ron Mayfield, and Ron Marlow. Of the remaining two AO unit employees, one—Robert Kamp—decided to retire after learning that that AO had lost the Texaco contract and the other—Larry Rhinas—was eventually employed by WPS on June 28.[7] In addition, Respondent temporarily transferred five employees from its Louisiana coker operations and hired six other employees off the street as well as AO employee Marty Cabello in order to commence its operations at Texaco on June 1.

On May 31, the Union called a special meeting at its hall in Anacortes to discuss its strategy concerning those AO employees who had not obtained employment with WPS. International Representative Tom Lind presided over the meeting. Nearly all the AO unit employees who had not been hired by WPS attended. Berlin, Murdzia, Nickerson, and Shelton also attended. Following an extended discussion those remaining voted to establish a picket line at the contractor's gate at midnight to protest WPS' failure to hire the other AO employees. In addition, the group passed a resolution asking Nickerson to encourage all those reporting for work with WPS that night—as Nickerson was purportedly scheduled to do—to walk out and engage in a strike.[8] However, this plan encountered a snag later that night when Erickson supposedly canceled the arrangement for Nickerson to report for work with WPS. Nevertheless, the Union established pickets at the contractor's gate at about midnight on May 31 and continued to maintain pickets at that location up to the time of this hearing.

[5] The first paragraph reads in part: "[A] team of people will interview employees of the present contractor and potential employees from the surrounding area, give pre-employment physicals, drug screens, arrange for C-Stop training, etc." The third paragraph of the document stated: "It is Hall-Buck Marine's hope that we could employ most of it's employees from the present contractors. We plan to use them and Hall-Buck Marine employees from our Exxon Coker to do the training of the new personnel."

[6] As it turned out, no AO employee was ever interviewed at the DCU site.

[7] The General Counsel moved to amend the complaint at the hearing to seek a remedy for Respondent's failure to hire Rhinas prior to June 28. I now grant that motion. Because Kamp decided to retire, the General Counsel seeks no remedy on his behalf.

[8] Erickson clearly knew of the plan to picket the contractor's gate that night by the time of his claimed call to Nickerson. Thus, Shelton testified that Erickson telephoned him after he returned home from the 3-hour union meeting to ask that he report earlier than scheduled due to the picket line plan. Under an arrangement apparently made that night, Shelton went to Smelley's motel around 10 p.m. where a group gathered and left for the DCU site at about 10:30 p.m. Erickson testified that he notified others scheduled to report that night to report earlier than originally planned.

B. *The Allegedly Coercive Statements*

The complaint alleges that Respondent violated Section 8(a)(1) by the statements of its agents to applicants for employment that it was nonunion and intended to operate on a nonunion basis at Anacortes. The General Counsel and the Charging Party also argue that the evidence addressed below supports their claim that WPS acted deliberately in staffing its new Anacortes' operation in order to avoid a legal duty to recognize and bargain with OCAW.

On May 19, Vernon Husk worked as a volunteer at the Mt. Vernon DES office and otherwise searched for employment as he had finished college in March. Husk noticed Respondent's job order posted at the DES office seeking 12 to 15 employees. Although Husk had a disability which precluded physical labor, he nonetheless became interested in seeking other employment with WPS. Accordingly, Husk introduced himself to Smith when he came to the DES office with Smelley on May 19 to speak with applicants there. Husk testified as follows about his contact with Smith at that time:

> Q. And how did—how did you apply? What did you do?
>
> A. Well, they were doing a mass interview back in one of the conference rooms. And I waited until that was over, and then they were interviewing people individually after that. And I caught them in between people. I believe the gentleman's name was Smith, his last name. And I told him what my intention was, to possibly get another position with them, not as a coker/laborer but as something else, maybe administrative supervisor or something, if something came open. And I'd filled out a copy of their application, and I gave them a cover letter, a [resume], and a copy of my transcripts. And I handed that to him, and he reviewed them real quickly and asked me to come in and sit down. He told me he'd talk to me.
>
> Q. Okay. What was your conversation with him?
>
> A. He told me a little bit about the company, he said they were out of Louisiana, that they'd bid on a coking operation over in Anacortes, that another firm had had it for a number of years, and they were the low bid and so they had taken it over. He said that it had been a union organization that was there previously and it was still there now, that they were taking over for it. *He said that they weren't union and they didn't plan on becoming a union. He said that they were going to try to rehire a few of the present employees there, over there with them, and he said about a quarter to a third of the old employees, and bring them over and work for them. And he asked me if I had a problem working for a non-union shop, and I said no, I didn't. And he asked me if I had a problem working for non-union wages, and I said no, I didn't.* And he said if they were interested or needed me for something, that somebody would be in contact with me, and he thanked me for my application.
>
> Q. Did they ever contact you?
>
> A. No, they didn't. [Emphasis added.]

Smith recalled receiving an application and a resume from an individual (whose name he could not recall) at the DES office that day. Although that individual sought a position with WPS in some capacity other than as a coke cutter, Smith spoke briefly with him as a matter of courtesy but he denied making statements pertaining to Respondent's intentions concerning unionization or making inquiries about that individual's union sentiments.

As discussed in more detail later, Ron Mayfield, an AO unit employee during the transition period, filed an application for employment with WPS. Three or four days before he learned about the unfavorable disposition of his application in late May Mayfield observed Smelley, Copeland, Erickson, and Berlin talking together on the DCU site so he joined the conversation at his break time. Mayfield provided this account of what occurred after he joined the group:

> Q. When you went over there, what happened?
>
> A. I was introduced to Buster Smelley and this Richard by Tim Erickson, and they continued on with their conversation.
>
> Q. And what was their conversation?
>
> A. Basically, it started, when I—well, when I got there they were talking about what WPS was, who they were, what they intended to do.
>
> Q. Okay. Who was speaking and what was said?
>
> A. At the time, Buster Smelley was talking, and we were just standing there listening. Like I said, they—he was telling us about WPS and . . . .
>
> Q. What did he say about WPS?
>
> A. Essentially, he was telling them who they were, the base pay down in Louisiana. *It went on to realizing we were union, but however they were not union and intended to keep it that way.*
>
> Q. What else was said in this conversation?
>
> A. *Essentially, that anybody that went to work for them, he would have to be non-union.*
>
> Q. Did you ask any questions?
>
> A. Not myself.
>
> JUDGE SCHMIDT: Wait a minute. You paraphrased this as "essentially"; do you recall what he did say in that connection?
>
> THE WITNESS: *Well, yeah, he—in the first part of it, he intended to stay non-union, and anybody that worked for him would be non-union.* [Emphasis added.]

Berlin, called as Respondent's witness, remembered that Smelley stated in this conversation that WPS was nonunion, that it had "bid the job nonunion, and that's what they had to base their pay scale on." Although Smelley could not recall the exact words used in this conversation to explain how WPS intended to operate at Texaco, he acknowledged that he, in effect, stated the following to those present at that time: "Yes, we intended to run it non-union, as we did the other places. But also, I also know that it's up to the people if they want a union. There's nothing I can do about it."

On Friday May 26, Erickson invited Stanley Bragg to his home for a salmon barbecue so he could meet and be interviewed by Smelley and Copeland. While discussing the working foreman's position that Smelley offered to Bragg at that time, Bragg claims that Smelley told him "[t]hat they [WPS] were a non-union company and that, with us being non-union, that we didn't have to put up with the bureaucratic bullshit of coddling people, that if they weren't working out and doing their job properly we could hire and fire

as necessary, and without having to coddle to the union." Bragg claims Smelley added that he didn't want anybody coming in there with "red-asses" because the company expected employees were to come in with "smiles" and ready to do the job.

Smelley testified that the term "red-ass," a Louisiana colloquialism, refers to a person who is upset. He acknowledged using the term, in effect, as shorthand to describe some of the AO employees he interviewed. Thus, he explained, even though many of the AO employees were "good people," he had found it very difficult induce them to work for WPS because several were upset over the comparatively low wages being offered.[9] Smelley recalled asking Bragg if he had any problem with crossing a picket line, rumored to be in the works, but he denied the remark attributed to him by Bragg about "union bureaucratic bullshit."

In a telephone conversation the following Sunday, May 28, Bragg discussed the employment offer which had been made to him on the previous Friday. At this time, he asked Erickson why WPS offered him employment in a position for which he did not consider himself qualified while passing over other clearly more qualified AO employees.[10] According to Bragg, Erickson explained that "*[t]hey were strong union people that just wouldn't conform to being a nonunion company, and that . . . Hall-Buck Marine was a nonunion company, they were going to remain nonunion, and they weren't going to hire red-ass union people.*" (Emphasis added.) Erickson denied saying anything about "strong union people," using the term "red-ass," or discussing the Union in any way with Bragg.

In late May, Smelley interviewed AO employee Larry White. White testified that the following occurred during the interview but this exchange is not alleged as an 8(a)(1) violation:

> Q. BY MR. SANDERS: What happened in the interview?
>
> A. Buster explained the—kind of the Hall-Buck Marine and Western Plant—the type of work they did, and told me they were from Louisiana, and just kind of a little introduction to the company, and then asked me if I had any questions.
>
> Q. What were your questions?
>
> A. I asked him about insurance. I have a son that's insulin-dependent and I need insurance to help take care of him. And I asked him about wages.
>
> Q. And what was his response when you asked about wages?
>
> A. Well, his—he said that they'd be paying between 9—$9 and 11.50 an hour for the different positions. And I made—I mentioned that it wasn't quite the cost of living, and *he told that me they're a non-union company and they can't afford to pay the union wages.* [Emphasis added.]

[9] As shown below, none of the AO employees who told Smelley directly that the offered wages were low received a job offer from WPS.

[10] As discussed later, Bragg worked primarily as a crane operator with AO. The working foreman's position with WPS was the functional equivalent of AO's CCI in that the working foreman served as the coke cutting crew leader. Bragg had virtually no experience as a coke cutter.

C. *The Applications of the AO Unit Employees*

The complaint, as amended, alleges that Respondent violated Section 8(a)(3) between May 17 and June 1 by refusing to employ or consider for employment 11 AO unit employees—Stan Bragg, Les Brown, Warren Fry, William Gillette, Tom Handy, Larry Lantis, Ron Marlow, Ron Mayfield, Larry Rhinas, Jeff Thurmond, and Larry White—in order to avoid successorship recognition and bargaining obligations. In addition, the complaint alleges that Respondent terminated Robert Nickerson on June 1 because of his Union membership and because of its belief that he was engaged in protected activities on behalf of the Union. The following summarizes the relevant evidence as it pertains to each of the foregoing individuals.

Stanley Bragg: Bragg began working at the DCU in 1984 for AO's predecessor and became an AO employee when it took over the DCU contract. He primarily operated the overhead crane and worked as a maintenance mechanic. Although he applied for a crane operator's position with WPS Smelley admittedly offered a working foreman's job to Bragg following a brief interview at Erickson's home on Friday, May 26. Erickson testified that Bragg called him the following day and "said he didn't want the job . . . [because he] was going to pursue other avenues, work in his shop."

Bragg, who considered himself to be a Erickson's longterm friend, concedes that he turned down the proffered working foreman's job because he had little experience working on the structure cutting coke and because he was unwilling to cheat on a qualification examination as Erickson asked him to do.[11] Bragg said that he questioned Smelley's offer during the interview on the ground that he lacked adequate experience in that aspect of the operation but Smelley purportedly told him that he did not "give a damn" as the other two crew members would do the work, and if they did not perform, Bragg could fire them or do whatever was necessary to get the job done.

Later that evening, Erickson called Bragg and Berlin at work and instructed both of them to break into his file cabinet where the old exams were kept and write up the tests in their own words. They did so but Bragg said that after he copied the diagrams and flow charts from the prior exams for about 3 hours, he decided that he did not want the job. He explained:

> And at that time I decided that I couldn't be responsible for people, and being subjected with the state, that I wasn't familiar with the job. And it's just too dangerous a situation to try to pull a bluff off and have somebody get hurt. So at that time I decided I just couldn't do it.

Bragg telephoned Erickson on the morning of May 28.[12] Bragg told Erickson that he could not go through with copying the tests and that Erickson could tell Smelley "to take the job and shove it up his ass." Nevertheless, Erickson urged Bragg to reconsider because Erickson wanted him "on

[11] Mary Swartz explained that her company had developed these examinations in order to meet a Federal "process safety management" requirement.

[12] A portion of this May 28 conversation is discussed above in subsec. B.

board." Bragg refused. He told Erickson that he felt "someone could easily be hurt or killed" and that he "just could not subject [himself] to doing this and being responsible for somebody when it was out of [his] area of expertise." According to Bragg, Erickson responded that he would like to do the same thing but he had just gone deep in debt to purchase a lot of property.

Erickson asserts that Bragg made no mention about the exam. He claims that Bragg merely told him that he "had been working for eleven years, he was tired of it and he wanted to collect unemployment."

Berlin corroborates Bragg's assertion that they had been asked to cheat on the CCI test. However, when Berlin told "them" that he did not want to be a working foreman because he did not feel qualified, he began his employment initially as an equipment operator. Later, Berlin completed another test administered by WPS and became a working foreman on June 15.

Les Brown: AO hired Brown in March 1990 to oversee the night loading operation, i.e., loading coke onto trucks for transport to the port, and as its safety coordinator-trainer. Brown qualified for these latter duties because of his considerable experience in coker operations at other locations. Brown completed a WPS application on May 19 and thereafter asked Erickson repeatedly about an interview but was given no information. Respondent contends that although Erickson did not entirely exclude Brown from consideration, it was contemplated that Copeland would permanently transfer to Anacortes as the assistant manager and perform many of the functions Brown had performed with AO. As it turned out, Copeland decided by June 10 to return to Louisiana but Respondent then recruited Phil Schofield, a former AO employee who had quit and moved to Utah in 1994, to return to the area and work at the DCU as WPS' assistant manager.

Brown claims that the Union agent servicing the AO unit encouraged all employees to accept a job with WPS if offered notwithstanding the lower wage rates and that he planned to follow that advice.[13] However, according to Brown, at lunchtime on Friday, May 26, he discussed his plans to attend a Led Zeppelin concert in Vancouver, B.C., that evening with a group of crew members in Erickson's presence. At the end of Brown's shift that day, Erickson asked Brown if he would be available for an interview with Smelley that evening. He asked Erickson to rescheduled the interview at anytime in the next 4 days because of his previously announced plans and Erickson purportedly agreed to do so. The following Monday, May 29, Brown asked Erickson about his interview but Erickson told him that both Smelley and he were too busy at that time. The following day Brown saw Smelley and Copeland in the A-O office and Brown asked Smelley about an interview. Smelley told Brown that he "might be able to get to you sometime" but he never did and Brown was never offered employment with WPS.

Erickson disputes Brown's account. He claims that he asked if Brown was available for an interview with Smelley at quitting time on May 25 and that Brown told him to tell Smelley to take the job and shove it. From this remark, Erickson assumed that Brown was not interested and presumably his application was no longer considered.[14]

Warren Fry: Fry began working at the DCU for AO's predecessor in 1990 and continued as an AO employee when it became the contractor. By 1995 AO classed Fry as a CCI. Fry completed a WPS application on May 19. Subsequently, Erickson made arrangements for Fry to take a physical on May 26 but Fry claims that no one ever interviewed him. Fry testified that he asked Erickson on numerous occasions whether or not he had a job with WPS but Erickson always told Fry that he did not know.

Erickson claims that Fry was a key employee he wanted on the new WPS crew and that Fry was interviewed. However, Erickson claims that Fry turned down the WPS job after taking the physical and stated that he planned to return to work for Lake Erie Trucking where he worked several years ago as well as work in his own repair garage because "he felt he could make more money there." Fry admittedly commented openly in Erickson's presence that he could not afford to work at WPS's proposed wages and that he had made more money than what was being offered to him 10 or 15 years ago when he worked at Lake Erie but he emphatically denied that he ever told Erickson or anyone else that he planned to return to that company.

William Gillette: Gillette began working at the DCU in October 1984 and became an AO employee when it acquired the contract in April 1990. AO classed Gillette as an equipment operator. His principal work involved operating the overhead crane. He also served as the recording secretary for OCAW Local 1-591 and as a member of its negotiating committee. As a result of his union position, Gillette learned on May 16 that WPS would replace AO as the DCU contractor when Mary Swartz notified him about Texaco's award of the DCU contract. His WPS application is dated May 22. Although Gillette asked repeatedly about an interview, Erickson always claimed that he had no information for Gillette. Finally, at the end of his final shift before the transition Gillette mentioned to Erickson that he planned to clean out his locker and Erickson told him that he thought that was appropriate.

[13] Berlin, one of Respondent's witnesses, corroborates Brown concerning the union agent's advice.

[14] Respondent called Marty Cabello, in part, to reinforce Erickson's testimony. Cabello claimed that Brown told him on May 30 and again on May 31 that Brown planned to tell Smelley to take his job and stick it in his "ass." I do not credit Cabello's testimony on this point. I gained the impression from Cabello's demeanor that he was eager to say or do virtually anything to curry favor with his new employer. But aside from that, Cabello's testimony is internally inconsistent and conflicts with Erickson's story. Cabello testified that took his WPS employment physical on the same day that Smelley interviewed him. G.C. Exh. 8 shows that Cabello took his physical on May 24. Nonetheless, Cabello testified that he did not yet know Smelley when Brown first made the disputed remark on May 30. And, by Cabello's account, Erickson was present when Brown made the remark again on May 31. Cabello claims that on that occasion Brown purportedly asked Erickson if he was going to get an interview and Erickson, after looking at a sheet of paper, said "Yeah." Cabello claims that Brown then told Erickson: "Well, you can tell Buster [Smelley] to take his job and shove it in his ass." Not surprisingly, Erickson never testified about any similar incident and, if he had, it would have undermined his claim that he assumed Brown was not interested in a job after Brown made the purported remark to him on May 25.

In fact Erickson excluded him from any consideration for employment by WPS because he felt Gillette lacked initiative, never exhibited any willingness to help others when he had a lull in his own work, and otherwise never seemed to be around when needed. Nickerson, a coke cutter on Gillette's crew, testified that Gillette participated in cross-training. In the last year, Nickerson estimated, Gillette and he exchanged jobs about 50 percent of the time. AO owner Swartz testified that Gillette was a "good operator" who could run all of the equipment at the DCU and that at one point she had considered promoting him to a position with greater responsibility.

Thomas Handy: Handy began working at the DCU in February 1989. He became an AO employee when it acquired the DCU contract. AO classed Handy as a CCII at the time of the transition. His WPS application is dated May 19. Handy testified that he called Erickson at the site about a week later to ask about an interview and a physical. Erickson paused and Handy heard Erickson ask someone in the office if he wanted to interview Handy. This unknown person answered affirmatively and Erickson then told Handy that he would make an appointment and get back to Handy. Having heard nothing after a few days, Handy called Erickson again and on this occasion Erickson told Handy that that it would be a while before he could get a physical because WPS failed to give the doctors adequate notice. Thereafter, Handy missed his entire 3-day shift that week with the flu. When Handy returned to work, he again asked Erickson about getting an interview, a physical, or a job. Handy claims that Erickson did not respond.

Erickson testified that he was unable to schedule Handy for a physical while he was sick. Thereafter, Erickson said he told Handy that the time was "just too short at that point." Handy never heard anything further about a job with WPS.

Larry Lantis: Lantis became an AO employee and began working at the DCU in October 1991. AO classed Lantis as a CCII. His WPS application is dated May 20. In response to Lantis' inquiry the following day about his chances for hire by WPS, Erickson said simply that he did not know. In fact, Erickson never considered Lantis for employment by WPS because he had been a "problem child" throughout his employment with AO. AO owner Swartz, whose views about her employees were seemingly never solicited by WPS, described Lantis as a very young employee who "had a problem . . . communicating with his . . . coworkers . . . but in the last six months he really did turn around."

Ron Marlow: Marlow began working at the DCU in February 1984 and became an AO employee when it took over as the contractor. At the time of the transition, AO classed Marlow as an equipment operator. Marlow's WPS application is dated May 22. Erickson never intended to recommend Marlow for employment with WPS purportedly because he had an "attitude problem." To illustrate that Marlow "was very slow at what he did," Erickson noted that Marlow was one of the last to submit an application. AO owner Swartz said that Marlow was a good equipment operator. However, sometime ago Swartz said that she had promoted Marlow to a CCI position but he had not worked out in that job because he was not a good leader so he reverted back to the equipment operator's position.

However, Marlow testified that he was off-rotation when he learned that WPS had been awarded the DCU contract and had begun taking applications. When he learned this, Marlow telephoned Erickson at work to request that he bring an application home that evening as they both lived in the same nearby town. That evening Marlow obtained an application from Erickson, completed it and dropped it off at Erickson's DCU office that night. Around May 25, Marlow asked Erickson about an interview and Erickson said that he had not heard anything from Hall-Buck as yet. The following day Marlow asked Erickson privately about an interview hoping that Erickson would level with him. Erickson again told him that said he did not know yet but it might be May 30 or 31. However, WPS never scheduled Marlow for an interview and he was never hired.

Ron Mayfield: Mayfield began work at the DCU in April 1989 for AO's predecessor and continued as an AO employee when it acquired the contract in April 1990. By May 1995, AO classed Mayfield as a CCI. Mayfield applied for a job with WPS on May 19. Around this time, he told Erickson that he might move to Wenatchee in south-central Washington to assist with the care of his sick father but that decision depended on whether or not WPS hired him. Later, when Mayfield asked about an interview, Erickson claims that he confronted Mayfield about his intention to move—which Erickson characterized as "common knowledge" around the DCU—and that Mayfield admitted to him that he planned to move because of the low wages WPS offered.[15]

Mayfield claims that after several others had been interviewed he asked Erickson why he had not been called for an interview and that Erickson told him, "Well, I threw your application away 'cause I heard you were moving." When Mayfield asked Erickson why he had not spoken to him first, Erickson's only response was, "Oh, well."

Robert Nickerson: Nickerson started working at the DCU in September 1990 for AO. At the time of the transition, AO classed Nickerson as a CCII but he had qualified himself as a CCI and as a crane operator. During the past 2 years, he served as the OCAW shop steward for the AO bargaining unit and about 6 months prior to the WPS takeover, the OCAW Local 1-591 members elected him to that union's executive board. Nickerson's WPS application is dated May 18.

After turning in the application, Nickerson asked Erickson frequently about his chances for hire. Erickson always replied that he did not know. In fact, Erickson claims that he wanted Nickerson on the WPS crew. Finally in late May, Erickson telephoned Nickerson and requested that he come

[15] Erickson testified as follows in connection with his exchange with Mayfield at the time the latter asked about an interview:

> A. He [Mayfield] asked for an interview. I told him that I understood he was moving. He said that that was correct, he was moving, and he was not interested in a job.
>
> Q. I didn't hear your last part.
>
> A. He was not interested in a job at nine bucks or ten bucks an hour.

In addition, Respondent called Jim Berlin who claimed that after the WPS pay scale became well known Mayfield stated that he would be unable to his pay bills working for $12 per hour, the highest paying job WPS offered, and that he would likely move to eastern Washington where his father lived.

to Smelley's motel in Anacortes for an interview.[16] Smelley, Copeland and Erickson were present when he arrived. After introductions, Smelley told Nickerson that Erickson had "highly recommended him" and indicated that WPS would hire him as one of its working foremen. Smelley then told Nickerson that he did not have any questions and asked if Nickerson did. Nickerson asked about the pay rate, benefits, and any written job descriptions for all of the positions. All told the interview lasted about half an hour and Nickerson left without any mention of a physical examination.

A day or two later, Nickerson became concerned about the lack of information concerning the physical as all others he knew about who had been interviewed had been told about a preemployment physical. This prompted him to call Erickson who told Nickerson that he had already missed his physical and that they thought he had backed out. After Nickerson explained that no one had ever contacted him about a physical, Erickson arranged for the physical to be rescheduled and brought the paperwork to Nickerson's home. Nickerson followed through and took a physical on May 30. At some time thereafter, Nickerson claims that Erickson told him to report to the DCU on May 31 at midnight for a meeting about setting up the WPS crews.

According to Erickson, following Nickerson's interview with Smelley and his preemployment physical, he attempted without success to reach Nickerson on the evening of May 31 to tell him to report for work that night.[17] Erickson said that he next saw Nickerson at 2 a.m. on June 1 on the picket line. Purportedly, Nickerson made an obscene gesture to Erickson and told him, "I guess this is your answer."

Nickerson claims that until about 4:30 p.m., when he left to attend the special union meeting at the Local's hall in Anacortes, he was home all day on May 31. Subsequently, at about 11:20 p.m., Erickson telephoned to advise that he should not report that night as scheduled ostensibly because WPS had not received the results of his physical. When Nickerson queried Erickson seeking an explanation for the last-minute notice, Erickson claimed that he had attempted to reach him "all day long." However, Nickerson claimed that if Erickson did call, he left no answering machine messages. Furthermore, when Nickerson left for the union meeting, he said that he had told his 15-year-old son, who remained at home, to call him at the union hall if Erickson called. Debora Nickerson, Robert Nickerson's spouse, testified that she answered the phone when the call came after 11 p.m. and recognized Erickson's voice.

Nickerson regularly engaged in picketing at the contractor's gate since June 1. About June 8, Smelley left the refinery through that gate and stopped to speak with Nickerson. Smelley smiled and mentioned that there was still a position for him at the plant. Nickerson asked him, "What about the rest of the guys?" but Smelley's response is unknown. In any event, Nickerson told Smelley that he would contact his union representative about the offer. Nickerson spoke to Smelley a few days later at the gate and asked Smelley through his rolled-up car windows if he still had a job. Smelley nodded "yes." Nickerson then inquired about the rest of the AO crew and Smelley again nodded "yes." As Smelley appeared to be joking on both occasions, Nickerson did not pursue the matter further other than contacting Union Representative Lind about the conversations.

Smelley recalled that, after the results from Nickerson's physical were known, he asked Nickerson at the picket line if he wanted to work for WPS. Nickerson laughed and asked if Smelley was kidding him. Smelley replied, "No; you've passed your physical." Smelley got the impression that Nickerson did not want the job because as he started to drive away, Nickerson gave him the "California [Highway] number one" sign.

By a letter dated June 13, Lind asked Smelley to confirm that he had offered to "hire all striking employees." Lind specifically named the 12 former AO employees who had not been hired. Smelley responded by a letter dated June 20 asserting, in effect, that Lind's letter constituted a claim in the nature of a jurisdictional dispute in violation of Section 8(b)(4)(D) of the Act. The letter further threatened a Section 303 action for "any damages to our Company by your Union, by those picketing on behalf of your Union or other representatives." In the concluding paragraph of his letter, Smelley asserts that no offer had been made to any individual on June 12 to hire the employees en masse, that the named individuals were entitled to apply for employment with WPS and that "the Company has no duty to bargain or negotiate with your Union." Nickerson had not returned to work by the time of the hearing.

Larry Rhinas: Rhinas began working at the DCU in April 1985 as a truckdriver hauling coke from the DCU to the port. In April 1986, Rhinas went to work for the DCU contractor as an equipment operator and became an AO employee in April 1990 when it acquired the DCU contract. AO classed Rhinas as an equipment operator. His WPS application is dated May 18. Eventually, WPS hired Rhinas on June 28. Erickson explained that he fully intended to hire Rhinas for the WPS crew but in explanation for the delay in Rhinas' hire until well after the transition Erickson said simply that "we just ran out of time."

Jeff Thurmond: Thurmond began working at the DCU in July 1993. AO classed him as a CCII at the time of the transition. His WPS application is dated May 20. Erickson testified that he recommended Thurmond for the new WPS crew. However, Erickson claims that Thurmond was upset about the rumored WPS wage scale at the time they discussed the arrangements for an interview with Smelley. Purportedly, Thurmond indicated to Erickson that he intended to give Smelley a piece of his mind about the WPS wage scale but Erickson urged Thurmond not to waste their time if he did not want the job.

Admittedly, Thurmond went through with the Smelley interview. According to Thurmond's account, Smelley initially spoke to Thurmond about a job as working foreman but he informed Smelley that he was not interested in that position. Thereafter, Thurmond pressed Smelley persistently about the wage he could expect in another position and Smelley finally stated that it was $10 per hour. This disclosure prompted Thurmond to tell Smelley that the rate was "kind of low." Toward the end of the interview Smelley asked Thurmond if he wanted to go ahead with the physical and Thurmond said "Sure."

[16] Nickerson described Erickson's call as a "spur-of-the-moment" request in which he asked, "Can you get up here right away . . . [to] take an interview?"

[17] Erickson said that he did reach a babysitter at Nickerson's home who said that Nickerson had gone to a union meeting.

As it turned out, the completion of Thurmond's physical required two separate sessions at the medical facility selected; the first session occurred in May on the same day as his interview with Smelley and the second occurred in June after WPS began performing the DCU contract. Erickson asserts that Thurmond returned to work on the day of his interview after completing the first portion of his physical and they further discussed the job situation with WPS. At this time, Erickson claims, Thurmond stated that he was not interested in the job because "he could find work in Sedro Woolley for that kind of money, and that he would do that."

Thurmond denied that he ever told Erickson or Smelley that he did not want a job with WPS. In fact, the only thing he recalled Erickson saying to him at anytime after his interview was: "When you come back in, they want you to get trained as quick as possible on the Lima and the Landel [cranes] and get qualified." However, no one from WPS ever informed Thurmond that he did or did not have a job.

Larry White: White began work at the DCU in November 1988 and became an AO employee when that company became the DCU contractor. At the time of the transition, AO classed White as a CCI. His WPS application is dated May 19. Near the end of May, Erickson asked White to attend an interview by Smelley and White agreed.

At the interview, Smelley explained the type of work Hall-Buck and WPS performed and asked if White had any questions. White asked about the wage scale for the working foreman's position Smelley had discussed with him and the health insurance program as he has a diabetic son who is insulin-dependent. Smelley told him that WPS's wages were between $9 and $11.50 an hour for the different positions with the highest rate going to the working foreman. White commented that the wages were not quite adequate for the cost of living in the area. As noted above, Smelley responded that that WPS was a nonunion company which could not afford union wages. At the conclusion of the interview, Smelley provided White an authorization form for a physical examination scheduled for the following day.

However, when White returned home that day his spouse reminded him that he was scheduled to be present at his son's oral surgery the following day to monitor his blood sugar while under the general anesthesia and that this surgery could not be rescheduled for 6 months if canceled. White promptly called Erickson to seek a rescheduling of his physical examination. Erickson, who expressed doubt as to another opening, suggested that White call the medical facility himself if he wanted. Admittedly, White did not follow this suggestion as he felt that WPS should be responsible for rescheduling the appointment because it paid for the physicals.

According to Erickson, Smelley interviewed White on May 30 and arranged for White's physical on May 31. Erickson admits that White phoned about the scheduling conflict posed by his son's surgery. Between that time and about 9 p.m. on May 31, Erickson claims that he tried several times without success to contact White and, hence, never learned whether White had taken the physical examination. Erickson next saw White among the group picketing the WPS entrance at Texaco and he assumed from that activity that White did not want a job with WPS. However, about a week prior to the hearing Erickson wrote to White offering him a position equivalent to the CC 2 position with AO. White told Erickson that he would respond to the offer after the hearing.

D. *The WPS Crew in June*

By June 1, WPS commenced operations with four former AO employees, five employees temporarily transferred from the Hall-Buck coker operations in Louisiana and six employees hired through the DES interviews. The four former AO employees were: Dave Murdzia, Marty Cabello, Jim Berlin, and Gerald Shelton. Shelton and Murdzia had considerable experience at the DCU. Shelton first started working at the DCU in July 1983 for AO's predecessor. At the time of the transition, AO classed Shelton as a CCI. WPS hired Shelton as a working foreman. Murdzia started work at the DCU in 1988 and became an AO employee when that company acquired the DCU contract. AO classed Murdzia as a mechanic at the time of the transition and WPS hired him as its maintenance foreman.

Berlin and Cabello had less experience at the DCU than any of the other AO employees. Berlin began working for AO in July 1994 as a casual load-out employee and then became the full-time vacation relief employee. As noted above, Berlin started with WPS as an equipment operator and became a working foreman on June 15. Cabello had worked for AO since November 1994 as a casual load-out employee. Although Cabello was listed on the General Counsel's Exhibit 3 as a unit employee prior to June 1, AO Owner Swartz disputed Cabello's status as a regular employee. WPS hired Cabello as a full-time equipment operator and maintenance employee.

Either on or before June 1 Respondent hired Joel Britten, Anthony Cassara, Ed Otto, Robert Parks, Walfrido Pereracasanova, and William Riley, Sr., for the DCU crew from outside sources, apparently the DES. Riley had worked for AO's predecessor but Swartz refused to hire him for her crew purportedly because of a volatile temper. None of the others had any prior refinery or coker experience.

From June 2–17 Respondent hired 10 additional employees. Although two, Phil Schofield and James Degenstien, had worked for AO in the past, both would be considered outside employees in terms of the legal analysis in this case.[18] The remaining eight employees had no prior connection with AO nor, insofar as is known, any prior experience in a coker operation.

E. *Further Findings and Conclusions*

1. The 8(a)(1) allegations

Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid and protection." Section 8(a)(1) prohibits employer interference, restraint, or coercion of employees exercising rights guaranteed by Section 7. The proscriptions found in Section 8 of the Act

[18] As previously noted, Schofield left AO about a year before these events. Gauging by the AO pay rate shown on his WPS application and Mary Swartz' testimony, Degenstien was clearly employed as a casual load-out employee and, hence, was never a unit employee for AO.

extend to applicants for employment. *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 117 (1941). Here, the General Counsel alleges that Respondent violated Section 8(a)(1) by Smith's remarks to Husk, by Smelley's remarks to a group of employees at the DCU and by Erickson's remarks to Bragg on the telephone, all to the effect that Respondent was nonunion and intended to remain nonunion.

In *Kessel Food Markets*, 287 NLRB 426, 428–429 (1987), the Board found that such statements in similar circumstances are coercive and violate Section 8(a)(1). Although such statements ordinarily fall within the scope of employer free speech, the Board rationalized an exception in *Kessel* due to the potential successorship context. Thus, even though *Burns* provides that a new employer has no obligation to hire the predecessor's employees, until the new employer has hired its work force, it does not know whether it will be union or nonunion under the *Burns* doctrine. By telling applicants for employment that it will be nonunion, the successor indicates to them that it intends to discriminate against the predecessor's employees to ensure its nonunion status. This rationale received court approval in *Williams Enterprises v. NLRB*, 956 F.2d 1226 (D.C. Cir. 1992).

Respondent argues in effect that the employee testimony supporting these allegations is not credible and that the denials of its agents should be credited. I reject that contention. Husk has virtually no interest in nor connection with this dispute which would serve to explain his willingness to give false testimony under oath. Likewise, I find it inconceivable that Bragg would refuse to cheat on an examination in an effort to obtain a job but would be willing to provide false testimony under oath in order to damage Erickson, a longtime friend. But most striking of all, in addressing the conversation Mayfield testified about, Smelley admits stating that WPS intended to run the DCU on a nonunion basis. Accordingly, on the basis of the testimony of Husk, Bragg, and Mayfield —I credit—as well as Smelley's own admission, I find that Smith, Smelley and Erickson told applicants for employment, including AO employees during the period when they had employment applications pending, that WPS intended to operate on a nonunion basis at the Texaco DCU and that their statements to this effect violated Section 8(a)(1), as alleged. *Kessel Food Markets*, supra.

2. The 8(a)(3) and (5) allegations

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." A refusal to hire applicants for employment inspired by employer antiunion motives violates Section 8(a)(3). *Phelps-Dodge Corp. v. NLRB*, supra.

As 8(a)(3) cases nearly always turn on the question of employer motivation, the Board and the courts employ a causation test to resolve such allegations. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. The critical elements of discrimination cases are protected activity by the employee known to the employer and hostility toward the protected activity. *Best Plumbing Supply*, 310 NLRB 143 (1993). Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination. *Equitable Resources*, 307 NLRB 730, 731 (1992). Statements by a successor employer that it intends to operate nonunion "itself supports a conclusion of illegal motive" underlying its refusal to hire its predecessor's employees. *Love's Barbecue Restaurant No. 62*, 245 NLRB 78, 80 (1979), enfd. sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

If the General Counsel establishes a prima facie case, the burden then shifts to the employer to persuade the trier-of-fact that the same adverse action would have occurred even absent the employee's protected activity. *Best Plumbing Supply*, supra. To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). False defenses become a two-edged sword in that they may serve to support an ultimate inference of unlawful motive. *Shattuck-Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Section 8(a)(5) provides in substance that it is an unfair labor practice for an employer to refuse to bargain collectively with a certified or recognized employee representative. The essential question posed here under this provision of the Act is whether WPS is a legal successor of AO. In *Kallmann v. NLRB*, supra at 287–288, the court summarized the *Burns* successorship doctrine as follows:

> When employees have a collective bargaining agreement and a change in ownership occurs, the new owner must recognize and bargain with the employees' union if the new owner is found to be a "successor employer." *NLRB v Edjo, Inc.*, 631 F.2d 604, at 606–607 (9th Cir. 1980); *Bellingham Frozen Foods Inc. v. NLRB*, 626 F.2d 674, 678 (9th Cir. 1980). The new owner is a successor employer if: (A) the employer conducts essentially the same business as the former employer, and (B) a majority of the new employer's work force are former employees or would have been former employees absent a refusal to hire because of antiunion animus. Id.; *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 611 (9th Cir. 1977).

That WPS continued performing the exact same operation as AO at the Texaco DCU is not disputed. Texaco contracted with WPS for that precise reason. However, as WPS did not hire a majority of AO's work force, the only remaining question in determining its successorship status is whether it would have done so "absent a refusal to hire because of anti-union animus" which is the essence of the complaint's 8(a)(3) allegations.

In my judgment, the General Counsel has established a strong prima facie case of 8(a)(3) discrimination designed ultimately to avoid any legal duty to recognize and bargain with the Union. Unquestionably, Respondent knew that the Union represented its predecessor's employees. At the very latest, it obtained that information when its management contingent met with the Texaco officials at the pre-award conference. At the same conference Respondent also disclosed its predisposition to operate in a nonunion environment. Subsequently, every agent of Respondent directly involved in the hiring process, namely, Smith, Smelley, and Erickson, made

statements at one time or another in the course of the 2-week hiring period, found unlawful above, reflecting Respondent's intentional implementation of a hiring scheme designed to assure a nonunion environment at Anacortes. When those rather powerful statements of intent are considered together with Respondent's early pursuit of an alternative applicant poll at DES, its lethargic pursuit of employees from AO's experienced work force and its ultimate need to import employees from Louisiana to commence its new DCU operation, I am compelled to conclude that a substantial basis exists to infer that an unlawful motive controlled Respondent's hiring decisions.

Likewise, I am satisfied that the General Counsel established a prima facie case that Respondent canceled the employment arrangements made with Nickerson immediately after learning about the union meeting on the evening of May 31 where Nickerson was selected to encourage the WPS employees to engage in a strike. Erickson admits that either Berlin, Murdzia or Shelton—all of whom attended the meeting—told him about the meeting that evening and that he acted to reach the other WPS hires to report for work early because of the threatened picket line. This evidence coupled with the claimed pretext concerning the results of the physical are sufficient to merit the inference that Erickson canceled the previous hiring arrangements after learning that Nickerson planned to foment a strike that night.

Respondent argues that it became quite pressed for time in putting together its Anacortes crew due in substantial part to a limited number of appointments for preemployment physicals it could obtain. It further argues that it became difficult to recruit its staff from the AO crew because those employees became distressed about its wage plan and rejected employment overtures. I find these claims insufficient to explain its conduct in hiring its Anacortes crew. On the contrary, several factors indicate Respondent's preference for hiring employees from sources other than the AO unit. First, the DES group actually became the largest single immediate source of its employees rather than a "backup employment pool" as Smith suggested even though nearly all lacked job-specific experience. Second, Smith's characterization of William Riley Sr., as a "gift" when located at the DES coupled with the obvious failure to aggressively pursue experienced AO employees lends strong support for the conclusion that Respondent preferred experienced outsiders to experienced AO employees. Third, Smith and Smelley together processed a greater number of applicants in one afternoon at DES than the entire AO crew; this fact coupled with other evidence indicating that little time was expended in the actual interviews of the selected AO employees indicates that the slow pace of processing the AO applicants resulted from some other reason. Fourth, in the course of hiring a substantial number of additional employees through the first half of June, Respondent virtually ignored the experienced pool of AO employees even though Erickson asserted that they had simply ran out of time to fully process the applications of Handy and Rhinas by May 31, White was on the picket line protesting WPS' failure to hire him, and the reasons advanced for not considering Brown evaporated when Copeland went back to Louisiana.

Furthermore, Respondent relied almost exclusively on Erickson to provide specific explanations of its reasons for failing to hire more employees from the existing AO crew. Unfortunately, I am unable to credit the great bulk of his testimony where it conflicts with that of the AO employees. I found his demeanor as a witness utterly unconvincing. At times he appeared to grope for responses to unusually straightforward questions. In the overall context, some of his answers, especially the those about the lack of time to deal with the applications of Handy and Rhinas, simply amount to a failure to justify the situation at all. His willingness to go to extreme lengths to implement Smelley's wishes as reflected in his instructions to Bragg and Berlin about the qualification examinations is disquieting. His testimony about his inability to reach Nickerson by phone on May 31 appeared contrived. Some of his evaluations of the AO employees are inexplicably at odds with Mary Swartz' evaluations. Finally, his candor in dealing with inquiries by the AO employees about their future employment prospects was virtually nonexistent.

I am likewise unconvinced by Smelley's general assertions that Respondent's hiring pattern resulted from a set of fortuitous business judgments unaffected by any antiunion motives in light the peculiar claim about a jurisdictional dispute and the otherwise threatening tone of his June 20 letter responding to OCAW Representative Lind. In fact, I find the tone of that letter and the credited account of Bragg about Smelley's remarks concerning unions during the May 26 interview to reflect a consistent, antagonistic mindset toward unionism. Oddly enough, however, Smelley's subsequent remarks to Nickerson in June about having received the results of his physical lend support to Nickerson's claim concerning the substance of the late night telephone call from Erickson on May 31 and undercut Erickson's account of what occurred that night.

In sum, I conclude that the explanations by Respondent's officials about the bases for the numerous individual decisions made in connection with the hiring of its Anacortes crew lack a credible quality and are insufficient to overcome the General Counsel's prima facie case. Having concluded that Respondent failed to meet its *Wright Line* burden, I find Respondent violated Section 8(a)(3), as alleged, in connection with the claim that Respondent failed to hire the 12-named AO employees between May 17 and June 1. The credited accounts of Bragg and Husk provide direct evidence that Respondent set about hiring its Anacortes work force with the deliberate intention of hiring less than a majority of the former AO crew in order to avoid a legal obligation to recognize and bargain with the Union. The remaining credible, circumstantial evidence lends substantial additional support for that same conclusion. Likewise, I credit Erickson's account of the telephone call received from Erickson late on May 31 canceling his scheduled reporting time for that night. As Erickson admittedly learned of the Union meeting that night from those in attendance, I conclude that Erickson canceled Nickerson's reporting time because he learned of the plan to encourage a strike among the WPS employees by Nickerson. Accordingly, I conclude that Respondent violated Section 8(a)(3), as alleged, in Nickerson's case.

Although Respondent may well have failed to hire some particular individuals on the AO crew under a lawful hiring scheme, at this stage it is Respondent's own unlawful conduct which gives rise to an uncertainty about whether or not any particular AO employee would have been hired and that uncertainty must be resolved against it. *State Distributing*

Co., 282 NLRB 1048 (1987). This is particularly true in Bragg's instance as there is no reason to believe that he would not have accepted a position as a crane operator, the position for which he applied and for which he felt qualified. Based on my conclusions above, I further find that absent Respondent's unlawful hiring practices, the presumption of the Union's majority status would have continued. Therefore, Respondent became a legal successor to AO's bargaining obligation with the Union from the time that it assumed the Anacortes operation. *Potter's Chalet Drug*, 233 NLRB 15 (1977). Under these circumstances, I conclude that Respondent was neither free to refuse to recognize the Union nor fix the initial terms of employment without first consulting with the Union. Accordingly, I conclude that Respondent violated Section 8(a)(5), as alleged, by refusing to recognize the Union and by unilaterally altering the wages, hours of work, holidays, vacations, health and welfare coverage, and pensions when it took over. *State Distributing*, supra, and the cases cited therein.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act which is the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act for the following appropriate unit of employees:

> All production and maintenance employees employed by WPS at Texaco's Anacortes, Washington, refinery, including working foremen, industrial maintenance workers, mechanics, operators, equipment operators, maintenance welders, maintenance mechanics, and laborers, but excluding office clerical employees, casual "load out" employees and guards and supervisors as defined in the Act.

3. By telling applicants for employment that it was nonunion and intended to remain nonunion, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to employ or consider for employment Stan Bragg, Les Brown, Warren Fry, William Gillette, Tom Handy, Larry Lantis, Ron Marlow, Ron Mayfield, Larry Rhinas, Jeff Thurmond, and Larry White in order to avoid successorship recognition and bargaining obligations and because they were represented by OCAW Local 1-591 while employed by AO, and by canceling Robert Nickerson's employment arrangement on May 31, 1995, because it believed he was engaged in protected concerted activities on behalf of Local 1-591, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By refusing to recognize and bargain with OCAW when it assumed the contract at the Texaco DCU unit and by unilaterally altering the wages, hours of work, holidays, vacations, health and welfare coverage, and pensions, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, my recommended Order (Order) will require Respondent to cease and desist therefrom and to take the following action designed to effectuate the policies of the Act.

As I have concluded that the nature and scope of the violations found here are similar to those in *State Distributing*, supra, the affirmative action in my order fundamentally tracks the Board's remedy in that case. Accordingly, my order requires Respondent to recognize and bargain with the Union as the exclusive representative of the unit described in Conclusion of Law 2, above. Additionally, the order requires Respondent, on request of the Union, to cancel any departures from the terms and conditions of employment that existed immediately before its takeover of the Texaco DCU contract and retroactively restore the preexisting terms and conditions of employment, including wage rates, hours of work, holidays, vacations, health and welfare coverage, and pensions, and make the employees whole by remitting all wages and benefits that would have been paid absent the departures made by it from June 1, until it negotiates in good faith with the Union to agreement or impasse. The remission of wages shall be computed as in *Ogle Protection Service*, 182 NLRB 682 (1970), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The order further requires Respondent to remit all payments it owes to the employee benefit funds and reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), for any expenses resulting from the Respondent's failure to make these payments. Any amounts that Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

In addition, the order requires that Respondent offer in writing immediate and full employment to Stan Bragg, Les Brown, Warren Fry, William Gillette, Tom Handy, Larry Lantis, Ron Marlow, Ron Mayfield, Jeff Thurmond, and Larry White in the positions they formerly held with AO, or if such positions no longer exist, in substantially equivalent positions, without prejudice to seniority or other rights and privileges they previously enjoyed, discharging if necessary employees hired from sources other than AO to make room for them, and make them as well as Larry Rhinas whole for all losses they may have suffered after May 31 by reason of the discrimination against them. Backpay shall be computed as in *F. W. Woolworth*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons*, supra.[19] In addition, the order requires Respondent to offer Robert Nickerson employment to the position previously offered prior to its withdrawal of that offer on May 31, or to his former position with AO if he so chooses, and make him whole in the same manner as specified immediately above. The reimbursement to the employee benefit funds on behalf of the forenamed 12 employees and reimbursements to them for any expenses resulting

[19] There is evidence that Handy suffered a minor stroke on July 12 and was unable to work for some period thereafter. Issues arising from that circumstance are left for resolution at the compliance stage of this proceeding. As Rhinas was employed by WPS on June 28, the calculation of his backpay would fall under both of the described procedures.

from the Respondent's failure to make these payments shall be in accord with *Kraft Plumbing & Heating*, supra. Any amounts that Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, supra.

Finally, Respondent will be required to post a notice informing employees of the outcome of this matter.

[Recommended Order omitted from publication.]